

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-221316

DATE: March 18, 1986

MATTER OF: Environmental Aseptic Services Administration

DIGEST:

1. Based on reasonable reading of solicitation as a whole, it is clear that the unit of inspection for purposes of determining unsatisfactory performance and assessing liquidated damages is each particular task performed in a building and not the building itself.
2. Bidder relies on oral statement from contracting officer deemed to be in conflict with the terms of the solicitation at its own risk and such a statement cannot be considered in determining a solicitation to be ambiguous.
3. Provision in a solicitation which authorizes deduction for value of unsatisfactorily performed tasks, monitored by random sampling, in proportion to the defective performance imposes a reasonable measure of damages.
4. Protest against provision in a solicitation that permits the government to deduct from the contractor's payment an amount representing the total contract value of the tasks monitored by customer complaint, when the number of defects exceeds the acceptable quality level, is denied when protester does not demonstrate how the value of these tasks would vary depending on the extent of the unsatisfactory performance beyond the acceptable quality level.

Environmental Aseptic Services Administration (EASA) protests allegedly defective specifications in invitation for bids (IFB) No. DABT39-86-B-0018, issued by the United States Army for custodial services at Fort Sill, Oklahoma. Specifically, EASA protests that the specifications concerning the criteria under which the government can make deductions for unsatisfactory performance are ambiguous and the solicitation imposes unfair monetary deductions for unsatisfactory performance.

We deny the protest.

Regarding EASA's complaint concerning the criteria for making deductions for unsatisfactory performance, the invitation incorporates by reference the standard Inspection of Services Clause contained in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.246-4 (1985). The clause generally must be included in all fixed-price service contracts. FAR, 48 C.F.R. § 46.304 (1985). It reserves the government's right to inspect all services, to the extent practicable, at all times during the term of the contract. The clause also provides that, when defects cannot be corrected by reperformance, the government may reduce the contract price to reflect the reduced value of the services performed.

The IFB contains additional quality assurance provisions under the heading entitled "Performance Requirements Summary (PRS)." The PRS permits the government to monitor the contractor's performance by specified means of surveillance. There are two means of surveillance at issue in this case. The first is random sampling of recurring services (including, for example, floor maintenance, dusting, and disinfecting surfaces), which the IFB states will be done using the concepts of Military Standard-Sampling Procedures and Tables for Inspection by Attributes, Apr. 29, 1963. Under this inspection procedure, inspection results attributable to a small randomly selected portion (sample) of a larger group (lot) of similar items (units) are attributed to all items in the larger group within a stated margin of error. The second means of surveillance at issue here is customer complaint.

The protester contends that the solicitation is ambiguous because it cannot be ascertained from the solicitation what the unit of inspection (the thing to be inspected to determine its classification as defective or nondefective) is for implementing the quality assurance provisions. EASA believes that parts of the solicitation suggest that the unit of inspection is an entire building so that the contract price of a whole building will be deducted for failure to satisfactorily perform any task within that building, while other parts of the solicitation suggest that the unit of inspection is each particular task, in which case only the contract price of a particular task will be deducted for failure to satisfactorily perform that task.

It is the obligation of the offeror to read the IFB as a whole and in a reasonable manner. Martin Widerker, Engineer, B-219872, et al., Nov. 20, 1985, 85-2 C.P.D. ¶ 571. EASA points to two solicitation provisions as support for its general statement that provisions in the solicitation suggest any defective performance in a building will fail the entire building. One provision states that "[r]outine work will be considered defective when . . . [t]he tasks in an area were not performed in strict accordance with the specifications." The term "work" in this provision was modified by an amendment to "work/tasks." This change indicates that this provision is intended to focus on the particular task being performed and that, if a task being performed in an area is not performed in accordance with the specifications, that task will be considered defective. Thus, contrary to EASA's suggestion, this statement indicates that a task is the unit of inspection.

The other provision relied upon by EASA states that, "[i]f performance in any area is judged unsatisfactory, the Contractor will be given a Contract Discrepancy Report by the Contracting Officer." This provision is part of a section detailing the procedures for tallying observations and defects for each type of cleaning task checked by random sampling. In this context, it is clear that this provision is intended to mean that, if a task is deemed to have been unsatisfactorily performed in a particular area, that defective task is to be noted. Thus, this statement also indicates that each task is the unit of inspection.

We further note that the agency's intention that each particular task be the unit of inspection and payment be deducted for failure to satisfactorily perform that task is evidenced in the initial solicitation by, among other things, the assignment of percentages for deduction from the contract price for exceeding the acceptable quality level (the maximum allowable degree of deviation from the requirement before the government will determine a specific service to be unsatisfactory/unacceptable) for each task, not a percentage based on each building. This intention is also supported by an amendment to the solicitation issued in response to the protest in which the word "task" was added to the following two provisions: "The principal method of surveillance will be the random sampling of selected tasks at specified periods of time during the month" and "the [quality assurance evaluator] will select areas, tasks and times for the random sampling using procedures in the sampling guides of this plan." We conclude that, reading the initial IFB in conjunction with the amendment, offerors

are on notice that the unit to be inspected for determining defective performance is each particular task performed in a building, not the entire building.

The only other support for the alleged ambiguity regarding the unit of inspection provided by EASA is a statement allegedly made by the contracting officer that unsatisfactory performance in parts of a building would result in rejection of the entire building. Even assuming such a statement was made, this was an oral statement, and we have frequently held that bidders rely upon oral advice at their own risk. Douglas M. Andrews, B-218687, May 17, 1985, 85-1 C.P.D. ¶ 571. This is particularly the case when, as here, the oral advice is deemed to be in conflict with the terms of the solicitation. Thus, the contracting officer's alleged statement cannot be considered in determining the solicitation to be ambiguous.

EASA also alleges that the criteria established in the solicitation for deducting for unsatisfactory trash removal and resupply of tissue, towels and soap are improper. The IFB provides that these tasks are to be monitored by customer complaint instead of random sampling and states the acceptable quality level for these tasks in terms of a percentage. EASA states that where a task is monitored by customer complaint the agency should set the acceptable quality level in terms of a specific number of defects instead of specifying a percentage. We find that the agency has resolved EASA's concern by amending the invitation and listing a specific number of defects as the acceptable quality level for these tasks.

EASA next argues that the solicitation imposes unfair monetary deductions amounting to a prohibited penalty for unsatisfactory performance. First, with regard to those tasks monitored by random sampling, EASA asserts that, in the event the proper interpretation is that the deductions apply to particular tasks, it is impermissible to deduct for an entire task in a building without regard to the extent or seriousness of failure to perform that task.

Liquidated damages are fixed amounts which the government can recover from the contractor upon proof of violation of the contract and without proof of the damages actually sustained. Environmental Aseptic Services Administration, 64 Comp. Gen. 54 (1984), 84-2 C.P.D. ¶ 510. A rate for

liquidated damages must be reasonable in light of the solicitation's requirements since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR, 48 C.F.R. § 12.202(b) (1985).

We will review a protest alleging that a solicitation's liquidated damages provision imposes a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, can adversely affect competition and unnecessarily raise the government's costs. Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 C.P.D. ¶ 194.

Before we will rule that a liquidated damages provision imposes a penalty, however, the protester must show there is no possible relation between the amounts stipulated for liquidated damages and losses which are contemplated by the parties. See Massman Construction Co., B-204196, June 25, 1982, 82-1 C.P.D. ¶ 624. A protester who objects to a solicitation's deduction provision has a heavy burden. Sunrise Maintenance Systems, B-219763.2, Nov. 26, 1985, 85-2 C.P.D. ¶ 603. It is the contracting agency that is most familiar with the conditions under which the services and supplies have been and will be used. Therefore, our Office will not question agency decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Id.

The protester has not met this burden with regard to those tasks inspected by random sampling. EASA merely alleges that the solicitation provisions permit deductions for unsatisfactory performance of a task which do not reflect the value of that portion of the task satisfactorily performed. We disagree. The deduction formula for the unsatisfactory performance of tasks which are subject to random sampling is such that the amount deducted will be proportionate to the defective performance of that task. For example, if the quality of completed work is unsatisfactory, that is, the acceptable quality level is exceeded, the contract price for that bid item is multiplied by the specified deduction percentage (the amount of the total contract price attributable to that task) and that amount is then multiplied by the percentage of the sample which is deemed unsatisfactory to reach the defective deduction. Therefore, if half of the sample of a task is deemed unsatisfactory, the amount deducted is half of the contract price for that specific task. Thus, the deduction will vary with the

percentage of the sample which is unsatisfactory, and we, therefore, conclude that this deduction formula provides for a reasonable measure of damages.

We believe the protester has also failed to show that the deduction provisions for those tasks monitored by customer complaint are objectionable. Although the protester has given two examples of tasks that will be monitored by customer complaint for which the specified deduction percentage is taken once the acceptable quality level is exceeded regardless of the number of defects in excess of the maximum allowed number, it has not shown how the value of the deduction is improperly weighted in relation to the total contract value of that task. EASA has failed to show how the value of these tasks would vary depending on the extent of the unsatisfactory performance beyond the acceptable quality level. Therefore, we conclude that the protester has not carried its burden of proof, since it has not demonstrated that the deduction provisions are arbitrary or otherwise unreasonable. See Sunrise Maintenance Systems, B-219763.2, supra.

Finally, in connection with EASA's complaints that the monetary deduction scheme under the solicitation is unfair, the implementation of a valid payment deduction system for deficient performance is a matter of contract administration, not for review by this Office. Starlite Services, Inc., B-219418, Oct. 15, 1985, 85-2 C.P.D. ¶ 410.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel